Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1986

No. 86-1951

JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL, and PHILIP STANLEY,

Petitioners,

vs.

ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD R. ANDERSON, AUSTEN HAYDIS, and JOHN A. CURRIE, constituting the members thereof,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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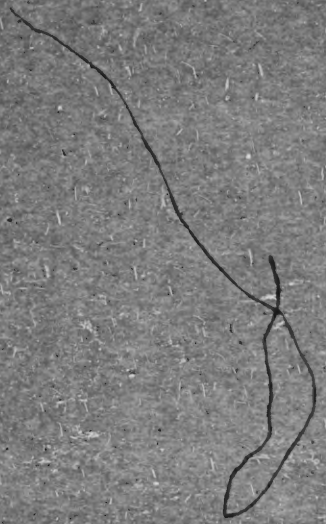

QUESTIONS PRESENTED FOR REVIEW

BY PETITIONERS

1. Did petitioners' claims that their employment could be terminated only for cause and that they had been deprived of liberty by respondents' dissemination of false information concerning the reasons for their terminations state a constitutional deprivation under 42 U.S.C. §1983?

2. Were petitioners required by the Court of Appeals to exhaust their administrative remedies prior to instituting their action pursuant to 42 U.S.C. §1983?

BY RESPONDENTS

1. Do Respondents' defenses of laches, *res judicata*, waiver, or good faith qualified immunity apply to foreclose Petitioners' claims?

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IN THE SUPREME COURT OF THE
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STATEMENT OF THE CASE:

1. Factual Background

The District Court issued comprehensive findings of fact which support the decisions reached by the District Court and the Ninth Circuit Court of Appeals. Respondents will not seek to summarize the findings of facts here. However, respondents will supplement the record so as to give a more complete background of this lawsuit and two related Arizona state court lawsuits.

Petitioners filed three lawsuits concerning the actions taken by respondents (or "Board") in January 1977. The first action was a special action filed in state court on February 28, 1977 challenging the validity of the

Board's non-renewal of petitioner's contracts under the Arizona open meeting law ("First Action"). The next day the present action ("Second Action") was filed in federal court seeking relief under 42 U.S.C. §1983 and the Fourteenth Amendment. In this Second Action, petitioners prayed for a *pendente lite* order for procedural safeguards to accord them a due process hearing. (The complaint in the Second Action makes no claims for substantive due process.) In over ten years since this suit was filed, the petitoners never sought the *pendente lite* order from the court to accord them a hearing with court directed due process procedures. Instead, the petitioners pursued the two state court actions.

On August 30, 1978, petitioners filed another lawsuit in state court ("Third Action") alleging that (1) that Arizona Western College (or "AWC") acted tortiously by not following the requirements of the AWC handbook which gave employees certain due process protections (Count 2); and (2) that AWC breached employees' contracts by not following the procedures (due process) set forth in the AWC faculty handbook (Count 1).

The Third Action for damages was filed after petitioners had received a favorable ruling in the state court special action (First Action) wherein Judge Nabours ruled that the actions of the Board in nonrenewing petitioners' contracts was in violation of the Arizona open meeting law. Judge Nabours, however, was reversed on appeal in an opinion written by U. S. Supreme Court Justice Sandra Day O'Connor, (CR 22 Ex. 1, see ER)[1]

[1] References to the record in this Response are as follows: "CR pg. ____, line [s] ____" refers to Clerk's Record as to the trial court docket number and if applicable, page and line number. "CR 74" which is the Findings of Fact and Conclusions of Law, is attached to petitioners' petition as Appendix I and shall be referred to as "F. of F." or "C. of L. _____." Petitioners' Appendix _____. "RT Vol. ____ pg. ____, line[s]" refers to the Reporter's Transcript of the trial in three volumes. "T.Ex.____" refers to Trial Exhibits. Petitioners' Excerpt of Record and Respondents' Supplemental Excerpt of Record in the Ninth Circuit Court are referred to as "ER" and "SER". Respondents' appendix is referred to as "APX _____."

and the case remanded. After trial, Judge Nabours ruled that the Board did not violate the open meeting law (CR 22, Ex. B, see ER).

Once the First Action (open meeting law) was concluded, respondents filed a motion for summary judgment in the Third Action (breach of contract) to which petitioners responded:

> The Arizona Court of Appeals reversed Judge Nabours' ruling concerning the open meeting law violation and remanded the action for further proceedings. After a trial on the merits, Judge Nabours determined that there had been no violation of the Arizona open meeting law; however, the result reached after that trial does not mean that plaintiffs are not entitled to the damages requested. (emphasis added.) (CR 51, Ex. 8, pg. 4, lines 5-12 see APX II)

Petitioners pursued the Third Action for damages claiming *de facto* tenure and due process rights under the Fourteenth Amendment. Respondents prevailed in the Third Action both at the trial court level and the appellate level. During the course of the Third Action, petitioners argued that they had requested a hearing but the hearing offered by the Board through their attorney Tom Cole's letter of March 3, 1977 (T. Ex. 31, see ER) would have been meaningless, (see pg. 5, lines 17-25 and pg. 15, lines 12-16 APX II). This was the first time in almost five years from the time of the offer of hearing[s] that petitioners ever raised this issue. Mr. Cole stated on the first page of his letter of March 3, 1977:

> Prior to the hearing, we will provide each employee entitled thereto with the grounds for the Board's action, . . . (emphasis added.) (T.Ex. 31, see ER)

Petitioners' request asked for the reasons/grounds "... at least two weeks prior to any scheduled hearing ...". Mr.

Cole did not state that the "nonrenewal" decisions were not supported by cause. He stated:

> None of your clients were terminated for cause and, as a result, we had not intended to produce any list of charges against them as we do not think it would be proper to proceed, with this case as though your clients had been dismissed. (emphasis added.)

This is true—petitioners were "nonrenewed", not "dismissed". Petitioners continued to work through the end of the school year (See F. of F. 1-9, Petitioners' Appendix 1-3). Under the handbook, reasons for a "dismissal" type termination were more severe than a "nonrenewal". What is more important though is that Cole further stated:

> "If we are not interpreting this part of your request correctly, please advise." (emphasis added.) (Pg. 2)
>
> . . . we want to insure that your clients' rights are adequately protected, . . . (emphasis added.) (Pg. 3)
>
> . . . if your research discloses any cases, statutes or other authorities which would indicate that the procedure we have outlined above is inadequate or otherwise inappropriate, we will be most pleased to receive the same so that we can review our position. (emphasis added.) (Pg. 3)
>
> After this exchange of views, perhaps we will develop some common grounds upon which to proceed. ... I will await to hear from you. (emphasis added.) (Pg. 3)

Cole wrote a follow-up letter on May 6, 1977 stating:

> Since you have commenced litigation against our client, the district governing board in both the state court and the Federal District Court for the District of Arizona, raising issues not only as to the requirement for hearings on behalf of your clients but also

as to the applicable procedures to be followed at these hearings, we have assumed that you are content with the status of the record and we therefore are not planning on going any further with the arrangements for the hearings pending the outcome of your litigation. If this presents any problem for you, please let us know. (T. Ex. 40, see APX 3)

Cole never received any response, either orally or in writing, to his March 3, 1977 or May 6, 1977 letters (RT Vol. 3, pg. 225, lines 3-25; pg. 256, line 1).

Because petitioners raised the due process issues in state court saying the hearing[s] offered were futile, inadequate, and meaningless, both the trial and appellate courts addressed those issues. In lengthy opinions, both courts found that the hearing[s] offered were not futile, inadequate or meaningless and that petitioners had adequate remedies in the state courts by mandamus (i.e. special action) to have the court set up the hearing[s] if they did not like what AWC's attorney offered.

In the trial court's 12 page order for summary judgment dated April 28, 1982, Judge Keddie found (CR 22 Ex. E, see ER; T. Ex. NN):

1. Failure to specify reasons in the letter did not justify the petitioners in failing to appeal to the board since Cole's letter of March 3, 1977 stated petitioners would be provided with the grounds for the nonrenewal before the hearing; however, even if Cole's response was not, suffificent, employees had a ready available "special action to force the board to comply with the handbook or to take other procedural steps which would satisfy any requirements of due process." (pg. 11, lines 14-23, pg. 11,lines 12-13 of order).

2. An adequate remedy existed in the college hand-

book so petitioners should have pursued it before seeking damages. (*Kaufman v. Pima Jr. College Governing Board,* 14 Ariz. App. 475, 478, 484, P.2d 244 (1971)). (Pg. 10 of order.)

3. That the board (pursuant to *Kaufman*) is given the authority by statute to exercise its judgment in its discretion and the full opportunity to exercise that discretion would require the petitioners to give the board the opportunity to correct any errors the petitioners contended the board made. (Pgs. 10-11 of order.)

4. There was no unreasonable delay in responding to employees' request for a hearing[s]. (Pg. 11, lines 3-13 of order.)

5. Petitioners elected to pursue the special action to hopefully find the board violated the open meeting law and elected not to pursue an appeal [hearing] to the board (Pg. 10, lines 3-6 of order).

The Arizona Court of Appeals in its 11 page opinion dated September 13, 1983 found (T.Ex. 00, see APX 5):

1. The hearing offered met due process requirements as the March 3, 1977 letter from Cole offered petitioners, prior to the hearing, the grounds for the board's action, an opportunity to appear at a hearing and submit evidence. (APX 5)

2. The letter illustrated the board's willingness to resolve any procedural differences in order to satisfy petitioners request for a hearing. In view of this desire to cooperate, the **pursuit of the hearing would not have been futile nor** would the hearing have been **inadequate.** It was noted that the board had conducted hearings in the past [1975] where employees had been reinstated. (APX 5)

3. That if petitioners believed the board's response to further discuss hearing procedures was inadequate employees could have brought a special action to compel the board to meet the requirements of the faculty handbook or other due process requirements. (APX 5)

4. Petitioners made a tactical decision to challenge the board's action by alleging that the board had violated the open meeting law rather than participating in the hearing offered by the board (APX 5). Petitioners received:

> "... clear notification from the board's counsel that the board was willing to give appellants an appropriate hearing comporting with applicable due process requirements." (see APX 5) (emphasis added.)

Petitioners never pursued this federal action for over five years until September 27, 1982 when they appeared before the federal court and asked for a trial date. (See CR 9/27/82.)

2. FACTS DETERMINED AT TRIAL

Contrary to petitioners' allegation in the petition, page 12, that cause never existed to justify the nonrenewal, four of the seven petitioners testified that they understood Tom Cole's letter and that they would be getting the reasons for their nonrenewal ahead of the hearing (Cooper, RT Vol. I, pg. 157, lines 20-24); Costin, RT Vol. II, pg. 22, lines 23-25, page 23, line 1; Stanley, RT Vol. II, pg. 71, lines 24-25, pg, 72, line 1, pg. 76, line 6-12; King, RT Vol. II, pg. 167, lines 22-25). Of the other three, Moorehead testified that through McConnell's press release of January 28 [June] (T.Ex. F and G) he understood they would be offered a hearing with a "bill of particulars" which meant that they would get the specific reasons for the nonrenewals before the

hearing[s]. (RT Vol. 2, pg. 118, lines 19-25 and pg. 119, lines 1-7; see F. of F. 28, Petitioners' Appendix 9.) Garcia testified that he never received a copy of Tom Cole's response (March 3, 1977) to his attorney's letter of January 28, 1977. The first time he saw it was at the time of trial (Garcia, RT, Vol. 3, pg. 38, lines 21-25, and pg. 39, lines 1-2). Pell testified that he was assured that they would receive a written statement of specific charges for the nonrenewals. (Vol. 2, pg. 193, lines 2-6.)

Three of the petitioners testified that they read Tom Cole's letter as not being a final offer but inviting a response by the petitioners' attorney. (Cooper, RT Vol. 1, pg. 159, lines 23-25, and pg. 160, lines 1-8; Costin, RT Vol. 2, pg. 24, lines 21-25, and pg. 25, lines 1-12; Pell, RT Vol. 2, pg. 223, lines 16-20). Pell's testimony indicated that he asked his attorneys to contact Cole and communicate with him about the letter; this was never done.

All of the petitioners testified that they wanted a hearing, most testifying that is why they filed the federal action (Cooper, RT Vol. 1, pg. 164, lines 22-25 and pg. 165, lines 1-19; Costin, RT Vol. 2, pg. 23, lines 10-11; Stanley, RT Vol. 2, pg. 77, lines 22-25; Moorehead, RT Vol. 2, pg. 139, lines 23-25, pg. 140, lines 1-7; King, RT Vol. 2, pg. 169, lines 4-12; Pell, RT Vol. 2, pg. 223, lines 21-25, and 224, lines 9-14; Garcia, RT Vol. 3, pg. 39, lines 3-25 and pg. 40, lines 1-4).

All five respondents and their attorney Tom Cole testified that they wanted to offer due process hearings to the petitioners. The five respondents further testified, and Cole confirmed, that the matter of the hearings was turned over to Cole as their attorney to respond to the petitioners' letter of January 28, 1977 and that they had no control over Cole and his response; they relied on him completely (Cole, RT Vol. 3, pg. 242 lines 25, pg.

243, lines 1-7, pg. 259, lines 11-23; Currie, RT Vol. 3, pg. 123, lines 11-19, pg. 126, lines 1-25, pg. 142, lines 16-21; Kammann, RT Vol. 3, pg. 155, lines 19-25 and pg. 156, lines 1-2, pg. 157, lines 3-6; McConnell, RT Vol. 3, pg. 180, lines 5-25 and pg. 181, lines 1-12, pg. 190, lines 16-22; Haydis, RT Vol. 3, pg. 199, lines 24-25, pg. 200, lines 1-25, pg. 205, lines 13-15; Anderson, RT Vol. 3, pg. 215, lines 19-25, pg. 216, lines 1-25, pg. 224, lines 21-25, pg. 225, lines 1-22, pg. 232, lines 21-25, pg. 233, line 1).

Attorney Cole testified that he had no problem with producing to the petitioners the exhibits and the evidence that he intended to use and a list of the witnesses they intended to use, (RT Vol. 3, pg. 248).

Cole testified that the tone of his letter was seeking further discussions to resolve any issues and finalize the procedures to be followed at the hearing[s], how many they wanted, when and where, etc. (RT Vol. 3, pg. 249, lines 2-6). He additionally testified that his letter was to point out his feelings and to solicit a meeting or reply in regards to the things that they were trying to get resolved (RT Vol. 3, pg. 252, lines 15-19). Cole further testified that the letter was not intended to be a final list of procedures that were going to be made available at the hearing (RT Vol. 3, pg. 273, lines 13-15); he testified he wanted to sit down with petitioners' attorney and make arrangements to secure the items they wanted (RT Vol. 3, pg. 248, lines 16-24 ,and pg. 279, lines 1-17); he testified he didn't mention such things as right to cross examination because that right is obvious (RT Vol. 3, pgs. 260-261, lines 24-25, 1-2). He confirmed that his attorney fees bill, T. Ex. K, covered January 17 through March 31 and a portion of the bill concerned his interviewing certain witnesses in preparation for the hearing[s] (RT Vol. 3, pg. 254).

All respondents and attorney Cole testified they never heard any allegations until approximately five years later, in February of 1982, in the state court damage action before Judge Keddie, that what Cole offered in his letter of March 3, 1977 in regards to a hearing was futile, inadequate and meaningless (RT Cole, Vol. 3, pg. 258, lines 24-25, pg. 259, lines 1-7; Currie, Vol. 3, pg. 126, lines 21-25; Kammann, Vol. 3, pg. 156, lines 9-17; McConnell Vol. 3, pg. 181, lines 19-25, pg. 182, lines 1-10; Haydis, Vol. 3, pg. 202, lines 7-11; Anderson, Vol. 3, pg. 226, lines 3-6).

Three of the respondents whose lengthy depositions were taken by petitioners' counsel in April of 1977, testified that they were never questioned in their depositions about Tom Cole's offer of a hearing being allegedly inadequate, futile or meaningless.[2]

SUMMARY OF ARGUMENTS

A. GENERAL STATEMENT; PETITIONERS ARE GUILTY OF LACHES

More than ten years have passed since the notice of nonrenewal. Petitioners sought money damages in excess of $2,000,000 in the state damage action (third action) and $400,000 in this federal court action, (second action) on facts that would reward them for not seeking a hearing[s] and reinstatement. Petitioners put all their eggs in one basket and elected to pursue what they felt was a technical violation of the open meeting law (first action) which could have resulted in the nonrenewal action by the board being void and their being reinstated automatically by law without a hearing. The

[2] Currie's deposition lasted three days, April 18th, 19th and 20th of 1977. It was 289 pages long (T. Ex. M); RT Vol. 3, pg. 127, lines 1-13. McConnell's deposition (T. Ex. L) was 321 pages taken April 20, 1977 (McConnell RT Vol. 3, pg. 182, lines 11-20). Anderson' deposition (T. Ex. N) was taken April 21, 22, 1977 and was 240 pages (RT Vol. 3, pg. 226, lines 7-25, pg. 227, lines 1-4).

petitioners therefore did not pursue a hearing for reinstatement through, 1) the board's offer by Attorney Cole's letter, 2) state special action/mandamus or 3) this federal action.

Petitioners in 1977 claimed *de facto* tenure rights in order to receive a due process hearing. The purpose of tenure is job protection/security so that an employee can test the reasons for nonrenewal by having a hearing to possibly be reinstated. The due process hearing must be at a meaningful time (near the time of the nonrenewal) and in a meaningful manner. Here, the petitioners were dilatory in not pursuing this federal action until the Fall of 1982 after they had lost the two state court actions, more than 5½ years after they filed this action; therefore, they are guilty of laches.

B. RES JUDICATA/COLLATERAL ESTOPPEL APPLIES

In the state damage action (third action) Judge Keddie's decision and the Court of Appeals' decision (APX 5) go to the very merits of this federal court action reviewing the same evidence and facts. Even if the state court action did not raise those issues, under *Migra v. Warren City School District Board of Education, et al*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed. 56 (1984), (an intervening U.S. Supreme Court case of January 23, 1984), petitioners are precluded from raising those issues in a 42 USC §1983 action if the law regarding preclusion in the state where the initial action took place would preclude such action in a subsequent suit. Arizona law would preclude this action.

C. WAIVER FORECLOSES PETITIONERS' ACTION

The uncontroverted evidence in the record establishes that AWC, through its attorney Tom Cole, offered a due process hearing or at least offered to negotiate for one with the petitioners. The petitioners thereafter waived

and abandoned such due process, including being given a more specific list of reasons and grounds for the nonrenewal.

D. THE DEFENSE OF GOOD FAITH/QUALIFIED IMMUNITY APPLIES

The uncontroverted facts show that respondents acted in good faith towards petitioners in the nonrenewals and accordingly respondents are immune from liability. The F. of F. 22 and C. of L. 9, 10 on this issue are clearly supported by the evidence. (CR 74, see ER and Petitioners' Appendix 6, 7, 19)

ARGUMENT OF AWC IN RESPONSE TO PETITIONERS' QUESTION NO. 1

Respondents offered a due process hearing to petitioners and agreed to advise petitioners of the grounds for the nonrenewal of their contracts in advance of any hearing. Petitioners rejected the offered hearing and never sought to learn the grounds for the Board's nonrenewal decisions. Now, after losing three lawsuits, two finding that procedural due process was offered, petitioners are claiming a constitutional deprivation under 42 U.S.C. §1983 on the basis that cause never existed to support the Board's nonrenewal decisions. Petitioners' claims are without merit because there was no constitutional deprivation of due process and because numerous defenses defeat such claims, i.e., waiver (C. of L. 4), res judicata (C. of L. 8), laches (C. of L. 7), good faith qualified immunity (C. of L. 9), and no vicarious liability for alleged civil rights violations (C. of L. 5).

The Ninth Circuit's first opinion of December 23, 1983 did not mandate that there be a trial on the issue of reasons, grounds or cause for the nonrenewals that occurred back in 1977. The Ninth Circuit mandated that three issues be reviewed:

1) the nature of plaintiffs' property interest in their employment; 2) ". . . the correlative procedural protections . . . they were entitled . . ."; and 3) ". . . the extent to which the Board's offer of hearing satisfied them."

There were no specific instructions as to what further proceedings were to be followed; therefore, the general rule is that upon reversal or remand for further consistent proceedings, the case goes back to the trial court and there stands for a new determination of the issues presented as though they had not been determined before. The trial court also has discretion as to the scope of any new trial, which may be limited under appropriate circumstances (see *U.S. v. Iriarte*, 166 F.2d 800, Cert. Den., 335 U.S. 816, 93 L. Ed. 371, 69 S.Ct. 36 (CA 1, Puerto Rico 1948)). Judge Craig correctly ruled and the Ninth Circuit has affirmed that the reasons, grounds or cause were not at issue eight years after the fact.

Petitioners continue to try to salvage their case from their initial error in not proceeding to a hearing in 1977, either through negotiating with the Board's attorney, Tom Cole, or through a special action [mandamus] in state court or through a *pendente lite* order from the Federal court in this case. Petitioners now claim that their complaint is based on a "substantive due process" claim that cause never existed to justify the nonrenewal decisions made by respondents. This is not what petitioners' unamended complaint states.

Plaintiffs alleged a deprivation of property (Paragraph XXXI APX I) and liberty (Paragraph XXXII APX I) without due process of law because they were deprived

of "procedural due process" as they allegedly were not given the safeguards required by minimum standards of "procedural due process". The prayer confirms this when it asks the court to order the respondents to afford the petitioners due process procedures. The complaint does not complain that the board's decision was based on constitutionally impermissible reasons of race, religion, sex, or that it was arbitrary, capricious or without rational basis.

The respondents, based on their attorneys' advice, did not notify the petitioners of the specific reasons for non-renewal either in their verbal or letter notices of non-renewal to petitioners (see Petitioners' Appendix I, App. pgs. 6-8). Respondents' attorneys only advised giving the general reasons out of the handbook. According to the federal cases, this was good advice.

In *Ferguson v. Thomas* 430 F.2d 852 (5th Cir. 1970) the Court stated:

> We doubt the wisdom of requiring the college to initially detail all of its charges in such cases. In the majority of terminations for cause many adversary matters would be best left unsaid for the future good of the instructor and the institution. At the outset, the college need merely indicate that termination for cause is in the offing. If the professor challenges the termination, then the college should come forward with its slate of reasons and the above procedures thus commence. (emphasis added.)

In good faith the Board, on advice of their attorneys, did not enumerate the reasons in the initial notice. Three of the Board members (Kammann, Haydis, and Currie) remembered the scandal of the hearings that they heard as board members in 1975 which received national attention because of the initial notices alleging dishonesty concerning abuse of Veterans' Benefits. All respondents testified they did not wish to harm the petitioners or their reputations. An additional reason for not giving specific reasons initially was to avoid stigmatizing the employee which could create a liberty interest question.

The petitioners certainly suffered no prejudice from not receiving specific reasons in the initial notice as they continued their employment through the end of the school year.

Even if petitioners raised a substantive due process issue in their complaint, as the court stated in *Jeffries v. Turkey Run Consolidated School District,* 492 F.2d 1 (7th Cir. 1974):

> Certainly the constitutional right to 'substantive' due process is no greater than the right to procedural due process. (pg. 4)

Here, when petitioners waived the procedural due process hearing they waived the right to receive the reasons or grounds. In *Hayes v. Cape Henlopen School District,* 341 F. Supp. 823 (Del. 1972), the court stated:

> The plaintiffs contend that Mrs. Hayes was **denied procedural due process by the board's refusal to provide her with a list of reasons for her termination and a hearing before the board.**
>
> Unlike the typical procedural due process in a public employment case in which the defendants specifically refuse to provide the plaintiff with the

> procedures requested, this case presents a situation where the defendants scheduled a hearing at which they intended to present the reasons for Mrs. Hayes' dismissal but she refused to avail herself of the procedures offered. ... The letter of Mrs. Hayes' counsel requesting a hearing indicates that one of the purposes of the hearing should be the enumeration of the reasons supporting the board's decision. On this basis the board intended to delineate the reasons for Mrs. Hayes' dismissal at the scheduled hearing. By failing to attend the hearing, Mrs. Hayes waived her opportunity to require the board to list the reasons for its decision. (emphasis added.)

Respondents' waiver argument is further supported in *Suckle v. Madison General Hospital,* 499 F.2d 1364 (7th Cir. 1974), wherein the court stated:

> The offer of a hearing was sketchy and did not specify all the procedural details to be followed; we accept the trial court's finding that plaintiff did not request a clarification. Judge Doyle felt obligated to to determine what procedures were reasonably implied in the offer, and what additional procedural safeguards plaintiff could reasonably have expected to be granted if requested. . . .
>
> [4] There is an easier ground of decision. We find it controlling that the offer of a hearing set forth no procedural details which clearly precluded compliance with due process. Under these circumstances plaintiff should have asked for any additional safeguards he desired. . . .
>
> Plaintiff complains that the decision below required him to speculate what the response to his request for additional safeguards might have been. We hold that when such a hearing is offered, the

> offeree should assume that it will be a fair hearing until the offeror indicates otherwise. . . .
>
> It is therefore incorrect to characterize the proffered hearing as a remedy which must be exhausted; for federal purposes, it is the right [to the hearing] which he seeks. He cannot sue in federal court to secure a right [to the hearing] which he declined when it was voluntarily offered to him. . . .
>
> It never indicated that his rights would be denied, and until there was such an indication, there was nothing to be remedied. The inquiry required of plaintiff by this opinion does not amount to exhaustion of remedies; rather, it is necessary to demonstrate the existence of a case or controversy.
>
> In our view the medical staff hearing offered on January 7th was neither explicitly nor obviously insufficient. Plaintiff was not entitled to reject it out of hand merely because it might turn out to be inadequate. Judicial relief is not warranted where a plaintiff rejects a seemingly adequate hearing without inquiring about procedural details that he considers crucial. (emphasis added.)

The *Suckle* approach that the offeree must assume the offered hearing will be fair sets forth a reasonable approach. Attorney Cole's letter offer of March 3, 1977 didn't specify all the procedural details to be followed. His letter reasonably implied that due process was being offered to the petitioners. His letter certainly set forth no details which clearly precluded due process. The letter was soliciting a response and none was forthcoming. Petitioners did not even request a clarification if they didn't understand its contents. Attorney Cole never indicated that petitioners' rights would be denied and until there was such an indication there was nothing to be remedied.

The Ninth Circuit in citing the *Jeffries* case, supra, in the case of *Brenna v. Southern Colorado State College*, 589 F.2d 475 (10th Cir. 1978), stated that the Fourteenth Amendment does not prohibit all state deprivations of property, but only those which are effectuated without due process of law. If the petitioners in anticipation of the hearing felt it would not be adequate, in Arizona they had the right to seek mandamus to have the court order the hearing (see *Kaufman v. Pima Jr. College Governing Board*, 14 Ariz. App. 475, 484 P.2d 244 (1971)). Therefore, any alleged deprivation was not "without due process of law."

Petitioners never alleged that Cole's offer of a hearing was futile, inadequate or meaningless until almost five years later in the state damage action (third action) in their response to AWC's Motion for Summary Judgment (February, 1982) (CR 51, Ex. 8, See APX II). Also in Cole's September 22, 1977 response in opposition to the petitioners' motion for summary judgment in the state court special action he alleged that the petitioners elected to abandon their request for administrative relief, (T. Ex. DD, See APX 4). Petitioners never responded to this statement.

If the reasons and grounds would have been at issue at trial there would have been in essence a hearing eight years after the fact. In the Ninth Circuit case of *Decker v. North Idaho College*, 552 F.2d 872 (9th Cir. 1977), the court cited by footnote, at page 875, that the district judge in *Mimms v. Board of Education*, 523 F.2d 711 (7th Cir. 1975) recognized that it would be stretching the limits of equity to order a hearing more than two years after the dismissal.

If petitioners had pursued the hearing expeditiously and if they thereafter were of the opinion that the procedures were not proper or that there was not "any

rational basis" to support the decisions of nonrenewal, they could have asked for a review by a state or federal court. The standard of that review in a federal court is a narrow one to be applied only where the action is not supportable on "any rational basis". See *Greenhill v. Bailey,* 519 F.2d 5, 10 n. 12 (8th Cir. 1975), and *Stevens v. Hunt,* 646 F.2d 1168 (6th Cir. 1981). As the court stated in *Stratford v. State House, Inc.* 542 F. Supp. 1008 (Ky 1982):

> . . . it would be extremely rare for a federal court properly to vitiate the action of a state administrative agency as a violation of substantive due process. The vast majority of such attacks may readily be disposed of on summary judgment, thus keeping interference by federal courts with state government to a salutary minimum. Review of state administrative action is primarily a matter for the state courts, which quite properly have a much broader scope of review under state law. (emphasis added.)

Even if school board members make a mistake in judgment or in weighing evidence as to reasons or grounds for nonrenewal there is no substantive due process violation where the board acts with good faith toward the teacher and with concern for the teacher's constitutional rights. See *Sullivan v. Meade Independent School District No. 101,* 530 F.2d 799 (8th Cir. 1976). Here the facts support that the individual respondents acted in good faith on advice of counsel, (See Statement of Case, supra, and F. of F. 22, 23, 41, and C. of L. 9, 10).

Lastly, the petitioners complain that the district court's order precluding the evidence concerning the existence of cause prevented petitioners from proving that information disseminated by the respondents was false and misleading so that they could not establish their claim as to an unconstitutional deprivation of their liberty interest. First of all, the court did not so rule. The court stated to petitioners' attorney, "And I see no reason if they [AWC Board] disseminated false information, why you can't show it." (RT Vol. 2, pg. 3, lines 4 - 6). Petitioners presented no documentary evidence nor did they list any witnesses in their pretrial statement that could testify to such unsubstantiated allegations. In over ten years there has never been any evidence presented that respondents disseminated false or misleading information about the nonrenewal of the petitioners. To implicate constitutional liberty interests the reasons must be sufficiently serious to stigmatize or otherwise burden the individual so that he is not able to take advantage of other employment opportunities. The stigma that infringes a liberty interest is that which: "Seriously damages a person's reputation or significantly forecloses his freedom to take advantage of other employment opportunities...". See *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310 (9th Cir. 1984), where the court stated that unpublicized accusations do not infringe constitutional liberty interests and further that "[l]iberty is not infringed by a label of incompetence", or "a charge of incompetence or inability to get along with co-workers . . . ." The court added that the accusations must be of "moral turpitude" like "dishonesty" or "immorality". Accusations that fall short of that level of severity do not infringe liberty interests (at page 1317). Proof that termination has made someone less attractive to potential employers is not

enough. (See *Martin v. Unified School Dist. No. 434, Osage Co. Kansas,* 728 F.2d 453 (10th Cir. 1984). Here, petitioners never made an offer of proof in regards to any alleged stigmatizing statements.

ARGUMENT OF AWC IN RESPONSE TO PETITIONERS' QUESTION NO. II

Petitioners argue that pursuant to *Patsy v. Board of Regents of the State of Florida,* 457 U.S. 496, 102 S. Ct. 2557, 73 L.Ed. 2d 172 (1982),' they can bypass the due process hearing and go directly to federal court to pursue damages. Again, the remedies they say they were deprived of, i.e. due process hearing[s] with reasons, were available through negotiating with the respondents' attorney, or in the state courts through mandamus or this federal action. They elected not to so proceed. This is not a case of aleged deprivation by reason of race, religion, sex, or free speech. Unlike in *Patsy* this is a unique situation where the basis for a 42 U.S.C. §1983 action is the adequacy of the administrative remedy; the decision by the court as to that question resolves the merits of the claim. Arizona state courts, trial and appellate, found that the administrative remedies offered were adequate, therefore, that decision resolves the merits of the petitioners' claims. In essence the state courts said the petitioners' waived an adequate due process hearing and procedures, however, using the language that the petitioners failed to exhaust [adequate due process remedies]. Now the District Court for the second time and the U.S. Ninth Circuit Court of Appeals for the first time have also found that AWC offered due process to petitioners. (CR 74, C. of L. 3, F. of F. 30 and 31, see ER and petitioners' Appendix I, App. pgs. 14-15.)

Patsy does not say that you get a trial and damages if you allege that you are deprived of a due process hearing, including reasons, even if one is offered to you. In

other words, there is no deprivation as long as the remedy or the basis of the allegation of lack of due process could be corrected or satisfied. Petitioners are seeking damages on facts that would reward them for not expediously pursuing the very thing their complaint says they wanted and testified they wanted and were deprived of, i.e. a due process hearing with the reasons or grounds. If that remedy is available then there is no deprivation without due process. If you are offered the very remedy that you are seeking, how can you be deprived of it! If the hearing would have been held and it resulted in depriving petitioners of due process, whether in a loss of property or liberty, then and only then would petitioners have suffered any deprivation without due process. Now petitioners argue because respondents followed the good advice of their attorneys to give initially only a general reason for the nonrenewal they can go directly to federal court and seek damages for the nonrenewals. A governmental entity can not be sued under §1983 for an injury inflicted solely by acts of its employees or agents, including attorneys. See *May v. Enomoto,* 633 F.2d 164 (9th Cir. 1980), and annotation Vicarious Liability of Superior Under 42 U.S.C. §1983 for Subordinates' Acts in Deprivation of Civil Right, 51 ALR Fed. 285.

In *Patsy,* ordering a hearing for Patsy would not have remedied her alleged deprivation of rights, privileges or immunities because of race and sex secured by 42 USC §1983 and the constitution. Here, however, the hearing would satisfy the alleged deprivation and if for some reason the hearing fell short of meeting due process procedures, then and only then would there have been a deprivation.

In *Dusanek v. Hannon,* 677 F.2d 538 (7th Cir. 1982), a tenured teacher sought reinstatement, and damages

against the school board pursuant to 42 U.S.C. §1983 alleging the board deprived him of his property interest in employment without providing a hearing. The court stated:

> We do not find the statutory and administrative procedure to be somehow arbitrary or unreasonable. . . . The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure. (Citing numerous cases.) These decisions do not amount to a requirement of exhaustion of administrative remedies as a predicate to a section 1983 claim. Rather they express a logical proposition that a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them. Because the procedural protections existed, the state could not be accused of withholding them in a § 1983 suit. Cf. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981). (emphasis added.)

Cohen v. City of Philadelphia, 736 F.2d 81 (3rd Cir. 1984) was a §1983 action for failure to afford a hearing. The Third Circuit stated:

> Cohen argues that to require him to proceed in state court is to require a section 1983 plaintiff to exhaust his state remedies before proceeding in federal court, contrary to Patsy v. Board of Regents, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed. 2d 172 (1982). Exhaustion is not however the issue. The necessary predicate to the claim for relief is that there has been a denial of due process under state procedures. Our holding is that the state has pro-

vided Cohen with due process by providing "reasonable remedies to rectify a legal error by a local administrative body," Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 832 n. 9 (1st Cir.), cert. denied, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed. 2d 385 (1982), and that therefore he has not alleged a constitutional violation entitling him to sue under section 1983. Although Cohen has waived his state law avenues of relief by his inaction, the very existence and apparent efficacy of such remedies defeats his claim that he was deprived of property without due process of law. . . .

In this case, the contention is that a state agency erred in its adjudication of plaintiff's claim against the state. There is no claim that the plaintiff did not have recourse to the state courts, that the agency was acting according to a state policy in denying plaintiff's claim, or that the state proceeding was constitutionally defective or insufficient. At least under these circumstances, we believe that Parratt bars this suit. (emphasis added.)

Also see *Suckle* case cited supra at pages 16, 17.

ARGUMENTS OF AWC AS TO APPLICATION OF AWC'S DEFENSES

Aside from waiver which is discussed *infra*, respondents have the following other defenses which defeat petitioner's §1983 claims: (A) laches, (B) *res judicata* (C) good faith qualified immunity; and (D) no vicarious liability for civil rights claims. (C. of L. 5, 7-9, Petitioners' Appendix 16-19) The District Court in its Conclusions of Law explains its reasons for applying each of those defenses. Respondents will briefly summarize the basis for two of those defenses, laches and *res judicata*.

A. THE DEFENSE OF LACHES APPLIES

There is always a presumption of prejudice suffered by a government employer when there is an unreasonable delay. See *Shakman v. Democratic Organization of Cook County*, 549 F. Supp. 801 (Ill. 1982) where the court stated:

> . . . the court is bound by public policy which requires the prompt assertion of the employee's rights so that "the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service". (Citing numerous cases, including Arant v. Lane, 249 U.S 367, 372, 39 S.Ct. 293, 63 L.Ed. 650 (1919).

In *Arant* the plaintiff delayed almost two years in pursuing reinstatement. The U.S. Supreme Court stated:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superiors or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, so the government service may be disturbed as little

as possible, and that two salaries shall not be paid for a single service. . . .

We agree with the Court of Appeals that it is entirely unnecessay to consider whether the removal of the relator from office was technically justified or not, since by his own conduct he has forfeited the right to have the action of the Secretary of the Interior reviewed and the judgment of that court is therefore affirmed [at 372, 395, Ct. at 294] (emphasis added.)

Petitioners did not pursue this federal action until the Fall of 1982 (see C R 9/27/82). Petitioners did not deligently pursue their due process rights so as to avoid the possibility of dual payment for the same service which would occur upon a delayed reinstatement. The petitioners are guilty of laches (see F. of F. 40 and C. of L. 7, Petitioners' Appendix 12 and 17).

B. THE DEFENSE OF RES JUDICATA/COLLATERAL ESTOPPEL APPLIES

The mandate issued by the Ninth Circuit on December 23, 1983 said that the due process issues were not encompassed in any state court litigation. This was clearly error; however, it makes no difference as there was an intervening U.S. Supreme Court decision, *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104, S.Ct. 892, 79 L.Ed. 2d 56 (1984) which held that *res judicata* applies to bar petitioners' present §1983 claims. *Migra* being an intervening decision, the district court on remand followed it in finding that *res judicata*/collateral estoppel applied. (See C. of L. 8, Petitioners' Appendix 18)

Petitioners have always contended that their state court damage action, filed in September of 1978, was based solely upon a favorable ruling in the special action dated February 22, 1978. This is obviously untrue as when the ruling was reversed and the trial was held and

judgment entered in favor of AWC in November of 1981, petitioners again did not pursue this federal action but pursued their due process arguments before Judge Keddie and the Court of Appeals in the state damage action. Petitioners stated that even though Judge Nabours' ruling was in favor of AWC, petitioners should still have judgement because their due process rights were violated in that what Attorney Cole offered as a due process hearing was futile, inadequate and meaningless (see APX 2). This contention was first raised in petitioners' responsive brief to AWC's motion for summary judgment in the state damage action in February of 1982 (CR 51, Ex. 8; See APX 2); therefore, necessarily Judge Keddie and the Court of Appeals of Arizona had to look at the adequacy of the offered due process hearing[s]. Both state courts concluded that what was offered was adequate and meaningful and did meet due process; therefore petitioners "waived" their rights to a hearing and the reasons. The petitioners recognized that these factual issues were decided against them by the Arizona Court of Appeals in both their petition for reconsideration and petition for review. In their motion for reconsideration (T.Ex. PP at page 8, lines 21 and 22; see APX 6), petitioners made the following statement:

> However, the court concluded that this exception [the administrative remedy being futile or inadequate] did not apply in the present action.

And, in their petition for review to the Arizona Supreme Court they stated (T.Ex. QQ at pg. 3, lines 1 through 5; see APX 7):

> To reach its decision affirming the trial court's ruling the court [Arizona Court of Appeals] necessarily determined factual issues, namely that the hearing offered by the Board would have provided an adequate remedy and that the plaintiffs' pursuit of this

hearing would not have been futile. (emphasis added.)

Therefore, the defenses of *res judicata* and collateral estoppel apply; however, even if employees had not raised these issues in state court, under the *Migra* decision the U. S. Supreme Court determined that plaintiffs are precluded, under the doctrine of res judicata, from raising issues in a 42 U.S.C. §1983 action if the law in the state where the initial action took place would preclude such action in a subsequent suit. In Arizona, a judgment is res judicata as to every issue decided in the previous action and any issue in the record which could have been decided. *Industrial Park Corp. v. U.S.I.F. Palo Verde Corp.*, 26 Ariz., App. 204, 547 P.2d 56 (1976); *Fraternal Order of Police Lodge 2 v. The Superior Court*, 122 Ariz. 563, 565, 596 P.2d 701 (1979).

The purposes of *res judicata* are to bring an end to litigation, to protect a defendant from repeated claims on matters which have previously been fully and fairly litigated, and to minimize inconsistent judgments. See *Lee v. Johnson*, 70 Ariz. 122, 216 P.2d 722 (1950; *Weller v. Weller*, 14 Ariz. App. 42, 480 P.2d 379 (1971).

In *Fraternal Order of Police, Lodge 2 v. The Superior Court*, cited Supra, the Arizona Supreme Court stated:

> The issue of petitioner's eligibility to become an employee representative was resolved implicitly in the judgment. Even if wrongly determined, and we express no opinion on the merits, the issue was res judicata. Respondent's remedy was by appeal. (emphasis added.)

Summary judgment is "on the merits" both in federal court and in the State of Arizona. See *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2nd Cir. 1977) and *El Paso Natural Gas Co. v. State*, 599 P.2d 175, 123 Ariz. 219 (1979). The Ninth Circuit in the recent case of *Clark*

v. *Yosemite Communtiy College*, 785 F.2d 781, (9th Cir. 1986) found:

> Although is is commonly said that a judgment has preclusive effect only if it is "on the merits," an opportunity to reach the merits is sufficient to invoke a preclusive effect. C. Wright, Law of Federal Courts §100A, at 680-81 (1983). The state court may not have expressly ruled on Clark's cause of action involving interference with his primary right to his teaching responsibilities, but he was not prevented from reaching the merits because of procedural barrier which constitutes an exception to the general rule of claim preclusion. Id.§100A, at 681. (Emphasis added.)

Additionally in *Roy v. City of Augusta, Maine*, 712 F.2d 1517, (1st Cir. 1983) the court stated:

> When a party should reasonably foresee that an adverse state court judgment will create a constitutional issue, that issue should be argued in state court, where it is not, the party is barred by principals of res judicata from later raising the constitutional claim against the same parties in a federal section 1983 action. . .

Also, the Ninth Circuit, in *Punton v. City of Seattle*, 805 F.2d 1378 (9th Cir. 1986), stated as follows:

> Punton's election to proceed initially in the state court amounted to a splitting of his cause of action as well as an election of remedies. At the start, he could have proceeded directly in federal court with a §1983 claim for reinstatement, back pay, and general damages. Instead, he first chose to seek the relief of reinstatement and back pay in the state court. (emphasis added)

Since plaintiffs' due process claims were raised (or alternatively, could have been raised), in the state court action, petitioners are precluded from pursuing their alleged claim in this federal court action. Thus, there is substantial evidence to support C. of L. 9.

CONCLUSION

The state trial and appeals courts, the Arizona Federal District Court and the U.S. Ninth Circuit have all now found that due process was offered to petitioners. The courts further found there was no deprivation of an adequate hearing[s] and petitioners' election to not pursue the hearing[s] but to pursue the two state court actions was in essence a waiver of the hearing[s] and receiving the reasons for nonrenewal.

The petitioners now have had three bites of the apple — two in state court and one in federal court, all three going through the full appeals procedures. The testimony and all evidence presented support the F. of F. and C. of L. so that petitioners' petition should be denied.

MOST RESPECTFULLY SUBMITTED AND PEACE BE WITH YOU, July 8th, 1987.

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APPENDIX I
PETITIONERS' FEDERAL COURT COMPLAINT

* * *

XXXI

In making the decision not to renew plaintiffs' contracts of employment, without notifying them of the nature of the charges against them and without affording them an opportunity for prior hearing or any other safeguards required by minimum standards of procedural due process defendants, and each of them, deprived plaintiffs, and each of them, of a property interest without due process of law in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution of the United States. (emphasis added)

XXXII

The non-renewal of plaintiff's employment contracts, together with the dissemination of false and misleading information concerning the bases for the decision, without opportunity for a prior hearing or any other safeguards required by minimum standards of procedural due process has operated to deprive plaintiffs, and each of them, of liberty without due process of law in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment to the Constitution of the United States. (emphasis added)

* * *

XXXIV

The deprivation of plaintiffs' constitutional rights by defendants, as hereinabove alleged, is a continuing one, for which plaintiffs have no adequate remedy at law. Unless ordered and directed to do so by this Court during the pendency of this litigation, defendants will continue to deny to plaintiffs a full and fair hearing before an impartial tribunal and other procedural safeguards required to accord plaintiffs due process of law. (emphasis added)

WHEREFORE, each of the plaintiffs herein pray judgment against defendants, and each of them as follows:

1. Awarding each plaintiff actual damages in the amount of $50,000.

2. Awarding each plaintiff punitive or exemplary damages in the amount of $50,000.

3. Ordering and directing defendants to cease and desist from the denial to plaintiffs of their right to due process of law, and directing defendants to accord to plaintiffs the following:

a. Written notification of the precise reasons for the non-renewal of each plaintiff's employment contract.

b. A full and fair hearing before an impartial tribunal to review the bases for the decision.

c. A detailed written summary of the charges to be made against plaintiffs, and of the evidence upon which such charges are based, and an identification of all witnesses who will support such charges.

d. Access to all evidence and witnesses upon which the board relies to support such charges.

e. Any other and further procedural safeguards which this Court deems necessary and proper to accord plaintiffs due process of law.

4. Declaring the Board's decision not to renew plaintiffs' employment contracts to be null and void.

5. Directing defendants to expunge from the records of Arizona Western College pertaining to plaintiffs any reference to the decision not to renew plaintiffs' contracts or to the reasons for such decision.

6. Granting a preliminary injunction according to plaintiffs the relief prayed for in paragraphs 3, 4, and 5 of this prayer for relief during the pendency of this action.

7. Awarding plaintiffs their costs and expenses incurred herein, including reasonable attorneys' fees.

8. Awarding plaintiffs such other and further relief as this Court deems just in the premises. (emphasis added)

APPENDIX II

PETITIONERS RESPONSE TO AWC'S MOTION FOR SUMMARY JUDGMENT IN THE STATE COURT DAMAGE ACTION BEFORE JUDGE KEDDIE (Page 4, 5, 12, 15, 16)

[Page 4]

automatically renewed by operation of law. Thus, on the basis of Judge Nabours' decision, the plaintiffs were entitled to the amount due them under their employment contracts.

The Arizona Court of Appeals reversed Judge Nabours' ruling concerning the Open Meeting law violation and remanded the action for further proceedings. After a trial on the merits, Judge Nabours determined that there had been no violation of the Arizona Open Meeting law. However, the result reached after that trial does not mean that plaintiffs are not entitled to the damages requested. (emphasis added)

At all times relevant to this litigation, there was a *de facto* tenure system in effect at Arizona Western College. This *de facto* tenure system gives rise to a legitimate expectation of re-employment in the absence of cause justifying the non-renewal of plaintiffs' contracts. The non-renewal of plaintiffs' employment contracts without cause, without opportunity for a prior hearing, and without any other safeguard required by minimum standards of procedural due process had deprived plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. As a result of the Board's wrongful non-renewal of plaintiffs' contracts, plaintiffs are entitled to reinstatement, backpay,

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punitive or exemplary damages, and incidental and consequential expenses incurred by plaintiffs. Plaintiffs are

also entitled to recover compensatory and punitive damages against defendants because the acts and conduct giving rise to the wrongful non-renewel of plaintiffs' contracts were wanton, willful and malicious. At a minimum, there are issues of material fact with respect to the existence of *de factor* tenure and the appropriate measure of damages that preclude summary judgment. (emphasis added)

Finally, defendants argument that plaintiffs failed to exhaust administrative remedies is without merit. Plaintiffs requested a hearing to challenge the non-renewal decisions before litigation was commenced. This request was ignored by defendants. After litigation was instituted by plaintiffs, defendants responded to plaintiffs request for a hearing. However, the hearing offered by defendants would have been meaningless. Defendants cannot now defeat plaintiffs' claims by arguing that administrative remedies were not exhausted when defendants did not comply with plaintiffs request for these same administrative remedies prior to the commencement of litigation. Even after litigation was commenced, the limitations placed on the hearing offered by defendants rendered the hearing meaningless. (emphasis added)

. . .

[Page 12]

United States Supreme Court stated in *Perry vs. Sinderman, supra:*

> In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by

procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution." (emphasis supplied).

In the present litigation, plaintiffs have alleged the existence of rules, resolutions, adopted policies, and understanding giving rise to *de facto* tenure at Arizona Western College. Therefore, at a minimum, defendants' motion for summary judgment on the *de facto* tenure issue must be denied.

B. Plaintiffs are entitled to the relief requested.

Several federal cases have discussed the appropriate measure of relief where teachers have been deprived of continued employment in violation of their constitutional rights. Where a teacher is discharged in violation of his constitutional rights, he is entitled to reinstatement and backpay to compensate him for the salary lost due to his improper discharge. See, *e.g, Skehan v. Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3d. Cir. 1974); (emphasis added)

. . .

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hearing. Therefore, plaintiffs instituted the open meeting litigation before Judge Nabours and filed a complaint in federal court to vindicate the Board's deprivation of plaintiffs' constitutional rights. These facts are reflected in a letter from Dan McAuliffe to plaintiffs dated March 3, 1977. (See Exhibit "C"). Thus, prior to the institution of litigation, plaintiffs, pursued all of their administrative remedies.

After the institution of litigation, plaintiffs finally received a reply to their request for a hearing. However, this reply rendered the hearing to be afforded plaintiffs

virtually meaningless. The Board denies plaintiffs' access to important information and refused to give reasons for the Board's actions until just prior to the hearing. Moreover, the Board indicated that plaintiffs were not terminated for cause. At this point it was obvious to plaintiffs that a hearing before the Board would serve no useful purpose in connection with rectifying the wrongful non-renewal of their contracts. (emphasis added)

The sequence of events leading to the commencement of litigation reveals that defendants' argument that plaintiffs' failed to exhaust administrative remedies is without merit. Plaintiffs made a concerted effort to obtain hearing before the Board. When plaintiffs did not receive a . . .

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response to their request for a hearing, they felt that their only recourse was to institute litigation. Thus prior to the commencement of litigation, plaintiffs exhausted their administrative remedies. It was only after litigation was commenced that defendants responded. Even then, the hearing offered to plaintiffs was rendered meaningless by the limitations placed on the hearing by defendants. Surely, defendants cannot escape liability for their wrongful acts on the basis of this argument.

III
CONCLUSION

As can be seen from the preceding discussion, summary judgment is inappropriate in the present case. The United States Supreme Court in *Perry v. Sinderman* held that a teacher in the same position as plaintiffs must be given the opportunity to prove the legitimacy of his claim to *de facto* tenure in light of the policies and practices of the educational institution. If the court declines to rule as a matter of law that there was a *de facto* tenure system in effect at Arizona Western College, there are at lease issues of material fact with respect to this issue that precludes summary judgment in defendants favor.

If plaintiffs prove the existence of *de facto* tenure and that the nonrewal of their contracts was improper, the Court must tailor an appropriate remedy. (emphasis added)

APPENDIX III
LETTER FROM AWC'S ATTORNEY TOM COLE TO PETITIONERS' ATTORNEY DATED MAY 6, 1977

May 6, 1977

Mr. Daniel J. McAuliffe
Snell & Wilmer
Attorneys at Law
3100 Valley Center
Phoenix, Arizona 85073

Dear Dan:

To date, we still haven't had any written reply from you to our letter of March 3, 1977 concerning your eight clients at Arizona Western College. You may recall that in our letter of March 3, we went over the requests that were contained in your letter of January 28, 1977 and tried to establish a little common ground upon which the hearings you requested might be conducted.

Since you have now commenced litigation against our clients, the District Governing Board in both the State Court and the Federal District Court for the District of Arizona, raising issues not only as to the requirement for hearings on behalf of your clients, but also as to the applicable procedures to be followed at those hearings, we have assumed that you are content with the status of the record and we therefore are not planning on going any further with arrangements for the hearings, pending the outcome of your litigation. If this presents any problem for you, please let us know. (emphasis added)

Additionally, you will please find herewith enclosed, the original and two copies of a Stipulation and Order for Association of Counsel so that we might formally associate our firm as attorneys for the defendants in the pending law suits. I would appreciate your executing the original and copies. I will secure the signature of Mr. Nebeker, see that they are properly filed and provide you with a conformed copy. Thanking you very kindly for your prompt attention to this matter.

Very truly yours,
ROLLE, JONES, BENTON & COLE
Tom C. Cole

TCC/jb
Encls.
cc: Mr. Robert Nebeker

APPENDIX IV

AWC'S RESPONSE FILED BY ATTORNEY TOM COLE TO THE PETITIONERS' MOTION FOR SUMMARY JUDGMENT IN THE STATE COURT SPECIAL ACTION DATED DECEMBER 22, 1977

[Page 6]

such request for hearing was transmitted to defendant's attorney Tom C. Cole, under cover letter dated February 7, 1977, a copy of which is attached hereto and by this reference made a part hereof.

On March 3, 1977, Tom C. Cole directed a letter to plaintiffs' attorney attempting to schedule a date for such a hearing and to resolve procedures to be followed at the hearing. At approximately the same time, defendants were served with the pleadings indicating the commencement of this action as well as the pleadings in the Federal District Court action. Apparently plaintiffs have elected to abandon their request for administrative relief in this matter. This was further discussed in the attached letter of May 6, 1977, addressed to plaintiffs' attorney to which no response has been received. (emphasis added)

The giving of notice of nonrenewal is a simple ministerial act, (*Knickerbocker v. Redlands High School Dist.*, 49 Cal. App. 2d 722, 122 P2d 289 (1942). There is no requirement that this notice be given by the Board as a whole, or after a meeting of the Board, or even that the decision to give such notice be made by a majority vote. (See affidavit of McConnell). As a matter of fact, there would be no reason why notice such as this couldn't have been given by an administrative officer of the college with or without the approval of the Board. This was the procedure followed in prior years (See affidavit of McConnell).

On the basis of the foregoing, the defendants take the position that the giving of notice does not constitute either "final action" or "legal action" within the meaning of the Open Meeting Law. This being the case, the Open Meeting Law would . . .

APPENDIX V

ARIZONA COURT OF APPEALS' MEMORANDUM DECISION AFFIRMING JUDGE KEDDIE'S JUDGMENT IN FAVOR OF AWC IN THE STATE COURT DAMAGE ACTION DATED SEPTEMBER 13, 1983

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DR. RALPH MOOREHEAD; DR. PHILLIP STANLEY; DR. JOHN COOPER; DR. JIM R. PELL; RONALD COSTIN; DR. ROBERT J. GARCIA; and JOE L. KING, *Plaintiffs-Appellants,* v. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD; CHARLES McCONNELL; WALTER KAMMANN; HAROLD R. ANDERSON; AUSTEN HAYDIS; and JOHN A. CURRIE, *Defendants-Appellees.*	1 CA-CIV 6771 DEPARTMENT D MEMORANDUM DECISION (Not for Publication; Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court of Yuma County
Cause Nos. 41044, 41045, 41046,
41047, 41049, 41050,
41051 and 41565 (Consolidated)
The Honorable Douglas W. Keddie, Judge

AFFIRMED

Winston & Strawn
By: Richard W. Shapiro
Ellen J. Waxman
Arthur P. Greenfield
Attorneys for Plaintiffs-Appellants
Phoenix, Arizona

Hunt, Stanley, Hossler & Rourke, Ltd.
By: Douglas S. Stanley
Attorneys for Defendants-Appellees
Yuma, Arizona

HAIRE, Presiding Judge

This appeal involves the propriety of a summary judgment entered in favor of the Arizona Western College District Governing Board (Board) and individual Board members in litigation arising from the Board's decision not to renew the appellants contracts of employment as faculty members of Arizona Western College. The following facts gave rise to this litigation.

After receiving notification of non-renewal of their contracts in January 1977, appellants retained counsel who sent a letter to the Board dated January 28, 1977, indicating that appellants believed that the non-renewal decisions were improper. Appellants' counsel also requested certain procedures including a hearing to review the decisions. Counsel for the Board did not receive this letter until February 8. He then responded to appellants in a letter dated March 3, 1977, which offered a hearing based on guidelines differing from the procedures outlined by appellants in their request. Appellants did not respond to this offer, and no hearings were held.

In September 1978, appellants filed these consolidated actions seeking damages for breach of contract and wrongful termination. The trial court granted the Board's motion for summary judgment on the ground that appellants had failed to exhaust their administrative remedies, and this appeal followed. Additional facts will be incorporated in the discussion of the arguments presented by appellants.

Appellants first contend that they exhausted available administrative remedies by requesting a hearing in the January 28 letter because the hearing offered by the Board did not comply with either the Faculty Handbook or with requirements of due process. We disagree. (emphasis added)

Requirements of due process when a teacher's contract is terminated include notice of the charges, notice of the evidence on which the charges are based, a hearing before an impartial tribunal, and the opportunity to present witnesses and confront adverse evidence at the hearing. See *McClanahan v. Cochise College*, 25 Ariz. App. 13, 16, 340 P.2d 744, 749 (1975). The March 3 letter offered appellants a hearing before the Board at which appellants could appear and submit evidence. Prior to the hearing, appellants would be provided with grounds for the Board's action. (emphasis added)

Appellants had requested access to documents and records of Arizona Western College and the Board pertaining to the Board's actions, as well as a statement of charges and a summary of witnesses and evidence used to substantiate these charges. Counsel's letter indicates that these requests presented "some difficulties" and continued as follows:

> "We are not aware of any authority for the proposition that these employees should have unlimited access to the records of the college; and this fact, coupled with the disruption that would

result from allowing such access, would probably lead us to advise the Board to deny your request unless you can show us some authority for your position. Also, since your letter indicates that you have already concluded that the actions of the Board were not in accord with the applicable legislation, policies, procedures and the like in effect at the college, we presume that you have already had an opportunity to review the relevant authoritative documents. However, if there is anything further you would like to see, please let us know.

"None of your clients were terminated for cause and, as a result, we had not intended to produce any list of charges against them as we do not think it would be proper to proceed with this case as though your clients had been dismissed. As indicated above, we believe that contract nonrenewal does not require an adversarial hearing where the Board has a burden of establishing cause for termination. This being the case, we do not see why dismissal issues should be interjected into the case. If we are not interpreting this part of your request correctly, please advise."

Thus, although counsel for the Board initially refused these specific requests, the March 3 letter stated reasons for the refusal and more importantly invited appellants to respond with further clarification and support for their position. The letter continued:

"The guidelines we have outlined in this letter differ significantly from the guidelines you requested in your letter; and since we want to insure that your clients' rights are adequately protected, we would like to resolve as many of these differences as we can prior to actually setting any cases for hearing. (emphasis added)

> Thus, if your research discloses any cases, statutes or other authority which would indicate that the procedure we have outlined above is inadequate or otherwise inappropriate, we will be most pleased to receive the same so that we could review our position. Likewise, if you are interested in any of the authorities supporting our view of how the matter should proceed, we would be most pleased to supply the same. After this exchange of views, perhaps we will develop some common ground upon which to proceed."

The above portion illustrates the Board's willingness to resolve the differences over procedures to be followed in satisfying appellants' request for a hearing. In view of this expressed desire to cooperate with appellants, we cannot say that pursuit of a hearing would have been futile and that the hearing offered by the Board would not have provided an adequate remedy. We note that the Board had conducted hearings in the past after which employees had been reinstated. (emphasis added)

Furthermore, if appellants believed that the Board's responses to further discussions about hearing procedures were inadequate, appellants could have brought a special action to compel the Board to comply with the Faculty Handbook or other requirements of due process.

Appellants point out that their January 28 letter requesting a hearing also requested a response from the Board within ten days. Appellants argue that after waiting more than one month without receiving any response, they justifiably believed that the Board was not going to provide a hearing and that their only recourse was to institute litigation. We note that appellants inadvertently failed to include counsel for the Board on the original mailing of the January 28 letter.

Consequently, counsel for the Board did not receive appellants' letter requesting a hearing until February 8. On March 3, counsel sent a letter to appellants offering a hearing. In view of appellants' oversight and the numerous issues raised by appellants' letter, we do not find that the period between appellants' January 28 request and the Board's March 3 response constituted an unreasonable delay.

Appellants also maintain that exhaustion of administrative remedies was not necessary because an appeal to the Board was a permissive remedy. See *Univar Corp. v. City of Phoenix,* 122 Ariz. 240, 244, 594 P.2d 86, 90 (1979). They cite the Faculty Handbook which provides: "If the faculty member believes the non-renewal is unjustified, he may appeal directly to the District Governing Board with or without the aid of legal counsel." (emphasis added). A statement to the same effect was read into the minutes of the Board meeting at which the nonrenewal decisons were affirmed: "Requests for a hearing by any of those persons above named before the Governing Board may be submitted within a reasonable length of time." (emphasis added).

This court has previously held that use of the word "may" creates an option only in the sense that a party may decide not to pursue any further review of an administrative decision. However, the "optional" hearing is a prerequisite if a party intends to seek Judicial Review. See *Arizona Law Enforcement Merit System Council v. Dann,* 133 Ariz. 429, 433, 652 P.2d 168, 172 (App. 1982). We are aware that the court in *Merit System* relied upon language in the Administrative Review Act, specifically in A.R.S. § 12-902(B), to find that an aggrieved party must file for a hearing if available before seeking judicial review. We also recognize that the Administrative Review Act. A.R.S. §§ 12-901 through 12-914, does not apply to decisions of the district gov-

erning board of a community college. See *McClanahan, supra,* 25 Ariz. App. at 15-17, 540 P.2d at 746-48.

Nevertheless, we believe that the rationale for making an administrative hearing a prerequisite for judicial review applies in this situation. Such a hearing affords the administrative agency "the first opportunity to correct its own mistakes, thereby eliminating or minimizing subsequent appeals and relitigation." *Merit System, supra,* 133 Ariz. at 432, 652 P.2d at 171 (quoting *Herzberg v. David,* 27 Ariz. App. 418, 419, 555 P.2d 677, 678 (1976)). See also *Farmers Investment Co. v. Arizona State Land Department,* 1 CA-CIV 5461 (Supplemental Opinion, filed Apr. 21, 1983) ("[T]he basic purpose of the exhaustion doctrine is to 'allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.' ") (quoting *Parisi v. Davidson,* 405 U.S. 34, 37, 92 S.Ct. 815, 818, 31 L.Ed. 2d 17, 25 (1972).

Appellants also argue that the Board treated the hearing as a permissive remedy. On March 1, just before the Board's March 3 letter to appellants indicating its willingness to hold a hearing, appellants filed actions against the Board in state court, claiming that a violation of the open meeting laws nullified the non-renewal decisions, and in federal court, seeking an order to compel the Board to conduct a hearing under the same procedural guidelines appellants had previously requested. When appellants did not respond to the Board's March 3 letter offering a hearing, the Board sent a letter dated May 6, 1977, which stated:

> "To date, we still haven't had any written reply from you to our letter of March 3, 1977 concerning your eight clients at Arizona Western College. You may recall that in our letter of March 3, we went

over the requests that were contained in your letter of January 28, 1977 and tried to establish a little common ground upon which the hearings you requested might be conducted.

"Since you have now commenced litigation against our clients, the District Governing Board in both the State Court and the Federal District Court for the District of Arizona, raising issues not only as to the requirements for hearings on behalf of your clients, but also as to the applicable procedures to be followed at these hearings, we have assumed that you are content with the status of the record and we therefore are not planning on going any further with arrangements for the hearings, pending the outcome of your litigation. If this presents any problem for you, please let us know." (emphasis added).

Appellants argue that this language indicates an agreement between the parties to proceed with the litigation rather than a hearing.

Appellants misconstrue this language, however. The litigation referred to is not the underlying action in this appeal, seeking damages resulting from the alleged breach of contract and wrongful termination. Appellants did not file the damage action until September 1978, more than one year later. Rather, the May 6 letter reveals that counsel for the Board believed that the Board could suspend any plans for a hearing because the issues of whether such a hearing was required and how it should proceed would be resolved in the suits pending in state and federal court. Contrary to appellants' assertion, the Board did not agree that a hearing was totally permissive and that appellants could immediately seek judicial review by pursuing this damage action. We therefore conclude that the appeal to the

Board was not a permissive remedy, but rather was a prerequsite to appellants' seeking judicial review of the Board's decisions not to renew their contracts.

Finally, appellants contend that the ostensible violation of open meeting laws excused any failure to exhaust administrative remedies. Initially, the trial court found that the Board's actions violated the open meeting laws thus nullifying the non-renewal decisions. On appeal, this court reversed the judgment of the trial court and remanded the matter to determine whether the Board intended to re-approve and adopt its non-renewal decisions at a later meeting held in compliance with the open meeting laws thus validating the Board's action. See *Cooper v. Arizona Western College District Governing Board,* 125 Ariz. 463, 610 P.2d 465 (App. 1980). On remand, in 1981 the trial court found that the Board had reaffirmed the non-renewal decisions.

Appellants contend that they could not have been required to appeal to the Board what initially appeared to them to be a void decision. They argue that it would be inequitable to now find that they should have appealed the non-renewal decisions when the issue of the open meeting laws violation was not resolved until more than four years later after an appeal and remand. This contention is without merit.

Appellants made a tactical decision to challenge the Board's action by alleging that the Board had violated the open meeting laws, rather than by participating in the hearing offered by the Board. The trial court initially found a violation in February 1978 from which the Board promptly appealed. Consequently, appellants were aware of the possibility of a reversal on the open meeting question long before they filed the damage actions in September 1978. (emphasis added)

Furthermore, appellants pursued different remedies in the two actions. Had they prevailed on the open meeting laws question, the non-renewal decisions would have been void and appellants would have been reinstated. Had they prevailed on the actions alleging breach of contract and wrongful termination, appellants would have been awarded damages. The fact that the open meeting action was pending on appeal does not excuse appellants' failure to exhaust administrative remedies available to review the propriety of the non-renewal decisons and determine appropriate damages.

In summary, we agree with the trial court's finding that appellants failed to exhaust their administrative remedies. Long before this particular litigation was commenced, the appellants had received clear notification from the Board's counsel that the Board was willing to give appellants an appropriate hearing comporting with any applicable due process requirements.Consequently, the court correctly determined that by reason of their failure to proceed with a hearing appellants were precluded from seeking judicial review of the Board's non-renewal decisions. We affirm the summary judgment granted by the trail court. (emphasis added)

LEVI RAY HAIRE, PRESIDING JUDGE
DEPARTMENT D

CONCURRING:

WILLIAM E. EUBANK, JUDGE

BRUCE R. MEYERSON, JUDGE

APPENDIX VI

PETITIONERS' MOTION FOR RECONSIDERATION BEFORE THE ARIZONA COURT OF APPEALS AS TO THE STATE COURT DAMAGE ACTION DATED SEPTEMBER 26, 1983

(Pages 3, 6, 7, 8, 9, 10, 11, 12)

[Page 3]

against Appellants, and (3) an adversarial hearing to establish cause for termination would not be held. In view of this Court's finding that when a teacher's contract is terminated, the teacher is entitled to notice of the charges, notice of the evidence on which the charges are based, a hearing before an impartial tribunal, and the opportunity to present witnesses and confront adverse evidence at the hearing, the conclusion is inescapable that Appellants were justified in pursuing judicial review of the Board's actions under these circumstances. At the very least, Appellants are entitled to have the issues of the adequacy of the administrative remedy available to them and the futility of pursuing the administrative hearing offered to them decided by the trier of fact. (emphasis added)

II

FACTUAL AND PROCEDURAL BACKGROUND

The Court is familiar with the facts underlying the present damage actions. However, a review of the sequence of events and the procedural background of the actions between the Appellants and Appellees is necessary to arrive at a proper resolution of the issues before the Court.

In January, 1977, Appellants were informed that the Board had determined not to renew their contracts of employment for the ensuing school year. Appellants im-

mediately notified the Board that they believed the termination and nonrenewal decisions were improper and unjustified. In a letter dated January 28, 1977, Appellants requested that they be afforded a full and fair

. . .

[Page 6]

Subsequently, appeal was taken to this Court. In a Memorandum Decision filed September 13, 1983, this Court affirmed the Summary Judgment granted by the trial court on the issue of exhaustion of administrative remedies. (A copy of the Memorandum Decision filed by this Court is attached hereto as Exhibit "A").

II

LEGAL ARGUMENT

GENUINE ISSUES OF MATERIAL FACTS CONCERNING THE ADEQUACY AND THE FUTILITY OF THE OPPORTUNITY GIVEN APPELLANTS TO CHALLENGE THEIR DISMISSALS IN AN ADMINISTRATIVE HEARING PRECLUDE SUMMARY DISPOSITION OF THIS CASE.

The standard to be employed in determining the propriety of granting a motion for summary judgment is well established in Arizona. All evidence and all inferences to be drawn from that evidence must be viewed in a light most favorable to the party opposing summary judgment. *Chanay v. Chittenden,* 115 Ariz. 32, 37, 563 P.2d 287, 292 (1977). The burden of showing that no genuine issue of material fact exists, regardless of who has the burden of proof at trial, rests with the party seeking summary judgment. Id. If there is the slightest doubt as to whether or not a factual issue remains in dispute, that doubt must be resolved in favor of a full trial on the merits. *Hegel v. O'Malley Insurance Co.,* 122 Ariz. 52, 55, 593 P.2d 275, 278 (1979); *Arizona Civil*

Rights Division v. Olson, 132 Ariz. 20, 24, 643 P.2d 723, 727 (1982). When these principles are applied to the present case, it is clear that this court was incorrect in resolving dis-

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puted factual issues in favor of the party urging summary dispositon. (emphasis added)

At pages 2-3 of the Memorandum Decision, this Court correctly recognized that "requirements of due process when a teacher's contract is terminated include notice of the charges, notice of the evidence on which the charges are based, a hearing before an impartial tribunal, and the opportunity to present witnesses and confront adverse evidence at the hearing. See, *McClanahan v. Cochise College*, 25 Ariz. App. 13, 18, 540 P.2d 744, 749 (1975)." In their letter to the Board dated January 28, 1977, Appellants specifically requested a hearing conforming to these due process requirements. On March 3, 1977, more than a month after their initial request, Appellants received a response from the Board, through its counsel, stating, among other things, that 1) none of the Appellants were terminated for cause; 2) the Board did not intend to produce any list of charges against Appellants; and 3) an adversarial hearing where the Board has the burden of establishing cause for termination was not required under the circumstances. Nevertheless, in affirming the Summary Judgment granted by the trial court, this Court found that "long before this particular litigation was commenced, the Appellants had received clear notification from the Board's counsel that the Board was willing to give Appellants an appropriate hearing comporting with any applicable due process requirements." (Exhibit "A" at page 10). (Emphasis Supplied) At a minimum, the record before this Court reveals conflicting evidence regarding the Board's

[Page 8]

willingness to give Appellants an appropriate hearing. Furthermore, at this stage of the litigation, Appellants are entitled to have the issue of the futility *vel non* of the "offered" administrative remedy resolved by the trier of fact, not this court on appeal.

This Court's finding that no exception to the exhaustion requirement applies to the instant case fails to consider the evidence in the light most favorable to Appellants, as is required in reviewing a Motion for Summary Judgment. In reaching its decision, this Court resolved a number of factual issues adverse to Appellants' position. Each is germane to the question of whether the exhaustion requirement should be rigidly applied to this case. (emphasis added)

1. Appellants were justified in concluding, under all the facts and circumstances, that pursuit of an administrative hearing would have been futile and the remedy inadequate.

In its Memorandum Opinion, this Court recognized that one well established exception to the exhaustion requirement is where resort to the administrative remedy would be futile or the administrative remedy is inadequate. *Amato v. Bernard,* 618 F.2d 559, 568 (9th Cir. 1980). However, the Court concluded that this exception did not apply in the present action.

In resolving this issue, the Court relied heavily on a portion of Mr. Cole's letter of March 3, 1977, wherein he invited Appellants' counsel to provide authorities indicating that the position taken by the Board was inappropriate. This Court stated,

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"in view of this expressed desire to cooperate with Appellants, we cannot say that pursuit of a hearing would have been futile and that the hearing offered by the

Board would not have provided and adequate remedy. We note that the Board had conducted hearings in the past after which employees had been reinstated." (Exhibit "A", pages 4-5).

A number of facts point to the opposite conclusion. First, in the same letter of March 3, Mr. Cole stated that the Board did not believe that an adversarial hearing to establish cause for termination was required under the circumstances. Second, in a letter prepared by Douglas S. Stanley, counsel for Appellees, dated January 14, 1977 (attached hereto as Exhibit "B"), the Board was apprised of its duty to provide Appellants with specific reasons for the Board's actions, which, as stated in the letter, "is the whole purpose of the procedure which calls for nonrenewal only for cause." This letter blows away any inference that the Board was unaware of its duties at the time the letter of March 3 was prepared, and establishes that it was never willing to provide an adequate hearing. Finally, with regard to this Court's statement that the Board had conducted hearings in the past after which employees had been reinstated, there is absolutely no evidence in the record to establish this fact, nor does the record reflect whether any prior hearings of the Board involved similar circumstances.

The role of the Court of Appeals in reviewing the granting of summary judgment is to determine whether there is any

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genuine issue of material fact underlying the adjudication. *Long v. Buckley*, 129 Ariz. 141, 629 P.2d 557 (App. 1981). Appellants have pointed to a number of facts indicating that the administrative remedy available to them would not have been adequate, and that pursuit of the administrative hearing would have been futile. Assuming these facts to be true, the exhaustion requirement should not be applicable to this case. At least Ap-

pellants are entitled to have the issue determined at trial. (emphasis added)

2. The Board's delay in responding to Appellants' request for a hearing was not justified.

Appellants' request for a hearing, dated January 23, 1977, was not answered until March 3, 1977. After waiting more than one month without receiving any response, Appellants believed that their only recourse was to institute litigation. Whether the exhaustion requirement should be rigidly applied to bar Appellants present claim depends, in part, on the reasonableness of the Board's failure to respond to Appellants' request for a hearing in a timely fashion.

At page 5 of the Memorandum Decision (Exhibit "A") this Court noted that Appellants "inadvertently failed to include counsel for the Board on the original mailing of the January 28th letter," and that "in view of Appellants' oversight" the period between Appellants' January 28th request and the Board's March 3rd response did not constitute an unreasonable delay. Neither in the record nor in the case law is there any basis for the suggestion that an aggrieved employee has the duty to discover, nevertheless

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notify, the attorney representing the Board in order to effectively request compliance with her or his due process rights. In fact, the one case touching upon the subject holds that when a specific request for a full and fair hearing has been made and the administrative body fails to provide such a hearing in a timely manner, the administrative remedies may be considered as having been exhausted. *Bowen v. Department of Social Security*, 137 P.2d 682, 685 (Wash. 1942). In dealing with this issue, the Supreme Court of Washington stated:

We think, so far as these proceedings are concern-

> ed, respondent exhausted his administrative remedies when he made demand upon the Department for a fair hearing. It was the duty of the Director to hold a fair hearing within 30 days from receipt of the demand. This, the Director failed to do. The respondent was not at fault. He had done all he could do to press his claim when he filed his demand for a fair hearing. To compel the Department to act, he, of necessity, had to resort to the courts. (emphasis added)

Id. In the present case, Appellants notified the Board on January 28th. The date on which counsel for the Board first learned of the matter is irrelevant to the issue at bar. Whether the Board was justified in failing to respond to Appellants' request for a fair hearing in a timely fashion is a factual issue that cannot be resolved on a Motion for Summary Judgment.

3. The Board did not intend to provide Appellants with a hearing conforming to the standards of due process.

At the conclusion of the Memorandum Decision, this Court stated, "long before this particular litigation was commenced, the

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Appellants had received clear notification from the from the Board's counsel that the Board was willing to give Appellants an appropriate hearing comporting with any applicable due process requirements." (Exhibit "A", Page 10). (Emphasis Supplied). Apparently, this Court considers that the issues of the Board's intent following the nonrenewal of Appellants' contracts and the adequacy *vel non* of the hearing offered by the Board in its March 3rd letter are relevant to the application of the exhaustion requirement. These are factual issues for which conflicting inferences may be drawn from the record. In a Motion for Summary Judgment, neither the

trial court nor the appellate court may weigh the evidence. *Northern Contracting Company v. Allis-Chalmers Corp.*, 117 Ariz. 374, 573 P.2d 65, 67 (1977). Even if there is no factual dispute, where possible inferences to be drawn from the circumstances are conflicting, a summary disposition is unwarranted. Id.

As stated above, the inferences this court is obligated to draw from the Board's letter of March 3, 1977 is that Appellants were not terminated for cause, the Board had no intention of producing a list of charges against them, and the Board was not willing to conduct an adversarial hearing to determine cause for termination. Assuming these facts to be true, as the procedural posture of this case demands, any hearing the Board may have offered would not have comported with the applicable due process requirements, and could not have provided Appellants with an adequate remedy. (emphasis added)

APPENDIX VII
PETITIONERS' PETITION FOR REVIEW BEFORE THE ARIZONA SUPREME COURT TO REVIEW THE COURT OF APPEALS' OPINION IN THE STATE COURT DAMAGE ACTION DATED NOVEMBER 7, 1983
(Pages 3, 4, 8, 9, 10, 11, 13, and 17)

. . .

[Page 3]

To reach its decision affirming the trial court's ruling, the Court necessarily determined factual issues, namely that the hearing offered by the Board would have provided an adequate remedy and that Plaintiffs' pursuit of this hearing would not have been futile. However, the record contains evidence supporting contrary factual findings. Plaintiffs, by letter, specifically requested that the Board grant them a hearing comporting with the requirements of due process. The Court reached these factual determinations even though the Board responded to Plaintiffs' request for a hearing with a letter stating that

(1) none of the Plaintiffs had been terminated for cause;

(2) the Board would not produce a list of charges against Plaintiffs; and

(3) an adversarial hearing to establish cause for termination would not be held.

(Appendix "A" at pp. 3-5). The Court interpreted this response to Plaintiffs' request as providing "clear notification from the Board's counsel that the Board was willing to give Plaintiffs an appropriate hearing comporting with any applicable due process requirements." (Appendix "A" at p. 10). (emphasis added)

Plaintiffs filed a Motion for Reconsideration of the Court's ruling on September 28, 1983 and on October 21, 1983, a divided Court of Appeals denied Plaintiffs' motion. A copy of the Order denying this motion is at-

tached hereto as Appendix "B".

. . .

[Page 4]

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Court erred by resolving, in a motion for summary judgment, factual issues concerning the adequacy and the futility of the opportunity given Plaintiffs to challenge their dismissals in an administrative hearing. (emphasis added)

2. Whether the Board's filing of an Answer to Plaintiffs' Complaint constituted a constructive denial of Plaintiffs' administrative claim.

III. STATEMENT OF FACTS

Plaintiffs commenced this litigation to review the Board's determination not to renew their employment contracts for the 1977-1978 academic year as members of the faculty and administrative staff at Arizona Western College. The Board reached its decision after meetings held in January of 1977.

Upon receiving notice of the Board's determination, Plaintiffs immediately notified the Board that they believed the termination and non-renewal decisions were improper and unjustified. In a letter dated January 28, 1977, a copy of which is attached hereto as Appendix "C", Plaintiffs also requested a hearing before the Board and other procedures to review the non-renewal decisions. Included within Plaintiffs' letter was a request that they be afforded a full and fair hearing; one comporting with standards of due process. Stressing the importance of resolving this matter as expeditiously as possible, Plaintiffs requested a response to their January 28, 1977 letter within ten (10) days.

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of granting a motion for summary judgment is well established in Arizona. All evidence and all inferences to be drawn from that evidence must be viewed in the light most favorable to the party opposing summary judgment. *Chanay v. Chittenden,* 114 Ariz. 32, 37, 563 P.2d 287, 292 (1977). The burden of showing that no genuine issue of material fact exists, regardless of who has the burden of proof at trial, rests with the party seeking summary judgment. Id. If there is the slightest doubt as to whether or not a factual issue remains in dispute, that doubt must be resolved in favor of a full trial on the merits. *Hegel v. O'Malley Insurance Co., 122 Ariz. 52, 55, 593 P.2d 275, 278 (1979); Arizona Civil Rights Division v. Olson,* 132 Ariz. 20, 24, 643 P.2d 723, 727 (1982). When these principles are applied to the present case, it is clear that the Court of Appeals and the trial court were incorrect in resolving disputed factual issues in favor of the party urging summary disposition. (emphasis added)

At pages 2-3 of the Memorandum Decision, the Court of Appeals correctly recognized that "requirements of due process when a teacher's contract is terminated include notice of the charges, notice of the evidence on which the charges are based, a hearing before an impartial tribunal, and the opportunity to present witnesses and confront adverse evidence at the hearing. See, *McClanahan v. Cochise College,* 25 Ariz. App. 13, 18, 540 P.2d 744, 749 (1975)." In their letter to the Board dated January 28, 1977, Plaintiffs specifically requested a hearing conforming to these due process requirements. On March 3, 1977, more than a month

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after their initial request, Plaintiffs received a response from the Board, through its counsel, stating, among other things, that (1) none of the Plaintiffs were termi-

nated for cause; (2) the Board did not intend to produce any list of charges against Plaintiffs, and (3) an adversarial hearing where the Board has the burden of establishing cause for termination was not required under circumstances. Nevertheless, in affirming the summary judgment granted by the trial court, the Court of Appeals found that "long before this particular litigation was commenced, the Appellants had received clear notification from the Board's counsel that the Board was willing to give Appellants an appropriate hearing comporting with any applicable due process requirements." (Appendix "A" at p. 10). (Emphasis supplied). At a minimum, the record before this Court reveals conflicting evidence regarding the Board's willingness to give Plaintiffs an appropriate hearing. Furthermore, at this stage of the litigation, Plaintiffs are entitled to have the issue of the futility *vel non* of the "offered" administrative remedy resolved by the trier of fact.

The Court's finding that no exception to the exhaustion requirement applies to the instant case fails to consider the evidence in the light most favorable to Plaintiffs, as is required in reviewing a motion for summary judgment. In reaching its decision, the Court resolved a number of factual issues adverse to Plaintiffs' position. Each of the following issues is germane to the question of whether the exhaustion requirements should be rigidly applied to this case. (emphasis added)

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1. Plaintiffs were justified in concluding, under all the facts and circumstances, that pursuit of an administrative hearing would have been futile and the remedy inadequate.

In its memorandum Opinion, the Court of Appeals recognized that one well-established exception to the exhaustion requirement exists in instances where resort to

the administrative remedy is inadequate *Amato v. Bernard,* 618, F.2d 559, 568 (9th Cir. 1980). However, the Court concluded that this exception did not apply in the present action. (Appendix "A" at pp. 4-5).

In resolving this issue, the Court relied heavily on a portion of Mr. Cole's letter of March 3, 1977, wherein he invited Plaintiffs' counsel to provide authorities indicating that the position taken by the Board was inappropriate. The Court stated, "In view of this expressed desire to cooperate with Appellants, we cannot say that pursuit of a hearing would have been futile and that the hearing offered by the Board would not have provided an adequate remedy. We note that the Board had conducted hearings in the past after which employees had been reinstated." (Appendix "A", pp. 4-5).

A number of facts point to the opposite conclusion. First, in the same letter of March 3, 1977, Mr. Cole stated that the Board did not believe that an adversarial hearing to establish cause for termination was required under the circumstances. (See Appendix "E"). Second, in a letter prepared by Douglas S. Stanley, counsel for Appellees, dated January 14, 1977 (attached hereto as Appendix "G"), the Board was apprised of its duty to provide

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Plaintiffs with specific reasons for the Board's actions, which, as stated in the letters, "is the whole purpose of the procedure which calls for nonrenewal only for cause." This letter blows away any inference that the Board was unaware of its duties at the time the letter of March 3, was prepared, and establishes that it was never willing to provide an adequate hearing. Finally, with regard to the Court's statement that the Board had conducted hearings in the past after which

employees had been reinstated, there is absolutely no evidence in the record to establish this fact, nor does the record reflect whether any prior hearings of the Board involved similar circumstances.

The role of the Court of Appeals in reviewing the granting of summary judgment is to determine whether there is any genuine issue of material fact underlying the adjudication. *Long v. Buckley*, 129 Ariz. 141, 629 P.2d 557 (App. 1981) Plaintiffs have pointed to a number of facts indicating that the administrative remedy available to them would not have been adequate, and that pursuit of the administrative hearing would have been futile. Assuming these facts to be true, the exhaustion requirement should not be applicable to this case. At least Plaintiffs are entitled to have the issue determined at trial.

2. The Board's delay in responding to Plaintiffs' request for a hearing was not justified.

Plaintiff's request for a hearing, dated January 29, 1977, was not answered until March 3, 1977. After waiting more than one month without receiving any response, Plaintiffs believed

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> dent was not at fault. he had done all he could do to press his claim when he filed his demand for a fair hearing. To compel the Department to act, he, of necessity, had to resort to the courts.

Id. In the present case, Plaintiffs notified the Board on January 28th. The date on which counsel for the Board first learned of the matter is irrelevant to the issue at bar. Whether the Board was justified in failing to respond to Plaintiffs' request for a fair hearing in a timely fashion is a factual issue that cannot be resolved on a Motion for Summary Judgment.

3. The Board did not intend to provide Plaintiffs with a hearing conforming to the standards of due process.

At the conclusion of the Memorandum Decision, the Court of Appeals stated, "long before this particular litigation was commenced the Appellants had received clear notification from the Board's counsel that the Board was willing to give Appellants an appropriate hearing comporting with any applicable due process requirements." (Appendix "A", Page 10). (Emphasis Supplied). Apparently, the issues of the Board's intent following the nonrenewal of Plaintiffs' contracts and the adequacy *vel non* of the hearing offered by the Board in its March 3rd letter are relevant to the application of the exhaustion requirement. These are factual issues for which conflicting inferences may be drawn from the record. In a motion for summary judgment, neither the court nor the appellate court may weigh the evidence. *Northern Contracting Company v. Allis-Chalmers Corp.*, 117 Ariz. 374, 573 P.2d 65, 67 (1977). (emphasis added)

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were within their rights in seeking judicial review when they did.

V. CONCLUSION

The record on appeal presents genuine issues of material fact precluding summary dispositon of this case. These issues include the futility *vel non* of the administrative remedy available to Plaintiffs, the reasonableness of the Board's delay in responding to Plaintiffs' request for a hearing and at the Board's willingness to provide an appropriate hearing comporting with applicable due process requirements. Plaintiffs are entitled to have these factual questions resolved by the trier of fact.

In addition, a recent decision by the Court of Appeals demonstrates that Plaintiffs, in fact, exhausted their administrative remedies. By defending Plaintiffs' Complaint on the merits the Board constructively denied Plaintiffs' request for an administrative hearing, and the propriety of seeking judicial review was thereby established.

For these reasons, Plaintiffs respecfully request that this Petition For Review by the Arizona Supreme Court be granted.

RESPECTFULLY SUBMITTED this 7th day of November, 1983.

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